

Questions and Answers On Rules Authorizing Electronic Service

Q.: Which rules were amended?

A.: Federal Rules of Civil Procedure 5(b), 6(e) and 77.

Federal Rules of Bankruptcy Procedure 9006, 9022.

Note: Civil Rule 5 is incorporated by reference into Criminal Rule 49 and Bankruptcy Rule 7005.

Q.: What do the new provisions authorize?

A.: Civil Rule 5(b)(2)(D) authorizes service of certain case documents by electronic means if the party to be served has consented in writing. Service by electronic means is complete on transmission, except where a party learns that attempted service did not reach the person to be served. These provisions are incorporated by reference into Criminal Rule 49(b) and Bankruptcy Rule 7005. Civil Rule 6(e) and Bankruptcy Rule 9006 provide that service by electronic means is treated the same as service by mail for the purpose of adding three days to respond. Civil Rule 77(d) and Bankruptcy Rule 9022 authorize courts to serve notice of entry of orders or judgments by electronic means as provided by Rule 5(b) (i.e. upon written consent of the person to be served.).

Q.: What forms of electronic service are covered?

A.: The new provisions permit any form of electronic service, including e-mail or fax, to which parties agree.

Q.: What types of documents may be served by electronic means?

A.: The provisions apply to service of documents covered by Civil Rule 5(a), but not to service under Civil Rule 4. Thus, service of process by electronic means is not authorized. Electronic service for notice of entry of court orders and judgments is also authorized by Civil Rule 77 and Bankruptcy Rule 9022.

Q.: What constitutes consent?

A.: Civil Rule 5(b)(2)(D) requires that consent be in writing. The Committee Note explains that the writing may be electronic. Consent cannot be implied from conduct (e.g. e-mail addresses listed on a firm's letterhead), but must be express and in writing (either electronic or paper form). The note encourages consents to specify their scope and duration. It also states that courts may "establish a registry or other facility that allows advance consent to service by specified means for future actions." This consent requirement applies both to service of court orders from the court and service of other documents from parties.

Q.: When is a document considered served?

A.: Electronic service is complete on transmission, although it is not effective if the person serving the document learns that the attempted service did not reach the person to be served.

Q.: Do the electronic service rules only apply in courts accepting electronic filing?

A.: No. Parties may agree among themselves to accept service by electronic means even in courts where all documents are filed in paper. If parties consent, a court may serve documents electronically (e.g. by e-mail or fax) under Civil Rule 77 or Bankruptcy Rule 9022 even if the court is not accepting filings from litigants by electronic means.

Q.: Are local rules required?

A.: No local rule is required under either Rule 5(b) or Rule 77 simply to authorize electronic service. However, where a court wants to use (or allow parties to use) “the court’s transmission facilities” to make service, a local rule is required.

Q.: Does the “three day rule” apply to electronic service?

A.: Yes. To avoid discouraging the use of electronic service, Civil Rule 6(e) and Bankruptcy Rule 9006(f) have been amended to treat service by electronic means the same way that service by mail has been treated; i.e., parties will be given an additional three days to respond.

Q.: What other rules are scheduled to be amended?

A.: The Committee on Rules of Practice and Procedure wanted the rules governing electronic service to be parallel to the extent possible across all the sets of rules. Thus, relevant sections of Appellate Rules 25, 26 and 45 and Criminal Rules 45 and 49(c) (to the extent the latter do not incorporate relevant Civil Rule provisions) are in the process of being amended in ways that will make their provisions similar if not identical. In addition, Bankruptcy Rule 9014 is being amended to apply Civil Rule 5(b) to service of certain documents in contested matters. These amendments are currently on a track that would make them effective in December 2002.